15

No. 91-913

In The
Supreme Court of the United States
October Term, 1991

JOHN R. PATTERSON, TRUSTEE,
Petitioner,
v.
JOSEPH B. SHUMATE, JR.,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF RESPONDENT

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52

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

Other Authorities

TABLE OF AUTHORITIES – Continued

STATEMENT OF THE CASE

This appeal concerns the ownership interest of Mr. Joseph B. Shumate, Jr., the Respondent ("Shumate"), in the Coleman Furniture Corporation Pension Plan (the "Plan"). Shumate is 62 years old and is presently unemployed. The retirement benefits that would be due to him under the Plan are necessary for his livelihood. Shumate has not been able to afford counsel and has proceeded *in forma pauperis* at each stage of these proceedings. The Petitioner, Mr. John R. Patterson ("Patterson"), is the duly appointed and acting trustee-in-bankruptcy for the bankruptcy estate of Shumate. Patterson has asserted a claim on behalf of the bankruptcy estate against Shumate's interest in the Plan. Patterson seeks to collect Shumate's pension and administer it for the benefit of Shumate's creditors.

In 1963, Coleman Furniture Corporation ("Coleman") established the Plan to provide retirement income protection for the benefit of its eligible employees and their beneficiaries. J.A., Vol. II, p. 191. The Plan was funded solely by contributions from Coleman. J.A., Vol. II, p. 312. The Plan was amended from time to time to assure compliance with changes in applicable laws. The Plan contains an anti-alienation provision as required by ERISA.[1] J. A., Vol. II, p. 342. Shumate was one of approximately 400 participants in the Plan at the time the controversy arose involving Shumate's interest in the Plan. Pet. App., p. 3A.

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[1] The district court recognized that the Plan appeared to qualify as a spendthrift trust under Virginia law. Pet. App., p. 189.

Shumate worked for Coleman for over 30 years. He participated in the Plan as an employee from its inception. He worked his way up through the company until he became president of Coleman in 1979. He served in that capacity until Coleman was forced to file a bankruptcy petition under Chapter 11 of the Bankruptcy Code on November 3, 1982. J.A., Vol. I, p. 119. Shumate served as administrator of the Plan during his tenure as president. J.A., Vol. I, p. 120. The Plan had a separate, independent trustee. Coleman, not Shumate, was the settlor of the pension trust. Shumate had voting control of a majority of Coleman's stock beginning in 1978; however, Shumate never had unbridled control of Coleman's assets. J.A., Vol. I, p. 110-11. In fact, the Court of Appeals for the Fourth Circuit recognized that the "control" that Shumate had over Coleman was merely the potential for exerting control. Pet. App., p. 22. The control was never actually exercised by him.

In July 1983, Coleman's Chapter 11 bankruptcy case was converted to a proceeding under Chapter 7 of the Bankruptcy Code. Roy V. Creasy ("Creasy") was appointed trustee of Coleman's bankruptcy estate. J.A., Vol. I, pp. 90 and 12-13. As a result of the conversion of Coleman's bankruptcy case, Shumate began to experience financial difficulties. Almost a year later, in June, 1984, Shumate filed a voluntary petition under Chapter 11 of the Bankruptcy Code. After Shumate's case was converted to a proceeding under Chapter 7 of the Bankruptcy Code, Patterson was appointed the Chapter 7 trustee for Shumate's bankruptcy estate. J.A., Vol. I, pp. 90 and 18.

Following the filing of bankruptcy petitions by both Coleman and Shumate, the administration and status of the Plan became the subject of lengthy and protracted litigation. In connection with that litigation, Shumate, Creasy and Patterson agreed to establish the value of Shumate's interest in the Plan at $250,000 (the "settlement"). The settlement was approved by the district court by order dated December 3, 1987. J.A., Vol. I, pp. 92, 94. In the proceedings below, the parties stipulated that the terms of the 1976 Plan governed this case. J.A., Vol. I, pp. 90 and 12-13.

On April 24, 1987, Patterson filed an adversary proceeding in the United States Bankruptcy Court for the Western District of Virginia (the "Turnover Action"), to recover Shumate's interest in the Plan on behalf of Shumate's bankruptcy estate. On July 27, 1987, Shumate filed a motion in connection with a pre-existing proceeding that was pending in the United States District Court for the Western District of Virginia to compel Creasy, who was then serving as the Plan's administrator post-petition, to pay over Shumate's interest in the Plan to Shumate. J.A., Vol. I, pp. 7-10. Patterson intervened in the district court action because he claimed an interest in Shumate's Plan benefit. J.A., Vol. I, pp. 84-87. Patterson's Turnover Action was subsequently consolidated with the district court action. *Id.*

On December 16, 1987, the district court conducted a hearing to determine the entitlement to Shumate's interest in the Plan. J.A., Vol. I, p. 106. On February 29, 1988, the district court issued a memorandum opinion and order in which it denied Shumate's motion to compel. Pet. App., p. 186. On March 8, 1988, Shumate filed a

motion to reconsider and amend order. J.A., Vol. I, p. 4. The district court granted Shumate's motion; but, on reconsideration, the court found no basis to alter its February 29, 1988, order. The court affirmed its ruling and granted Shumate the right to take an interlocutory appeal. Pet. App., p. 478. The Court of Appeals denied the petition to appeal.

On June 29, 1988, Shumate filed a motion for a new trial, and on August 15, 1988, Patterson filed a motion for disbursement and final order. J.A., Vol. I, pp. 4-5 and 170. A hearing was conducted by the district court on September 1, 1988. On September 2, 1988, the district court granted Patterson's motion and issued a final order directing the payment of Shumate's interest in the Plan to Patterson for the benefit of Shumate's creditors pursuant to the district court's earlier ruling. J.A., Vol. I, p. 178. Shumate appealed from the September 2, 1988, order.

The Court of Appeals for the Fourth Circuit reviewed the case on informal briefs and thereafter decided to have the case formally briefed and argued. The court appointed the law firm of Maloney, Yeatts & Barr, A Professional Corporation, as counsel for Shumate and heard the case. By published decision, the Fourth Circuit reversed the ruling of the district court and held that Shumate's interest in the Plan was not property of his bankruptcy estate under Bankruptcy Code §541(c)(2). Pet. App. pp. 1a-11a. The appeal to this Court followed.

SUMMARY OF ARGUMENT

The decision of the United States Court of Appeals for the Fourth Circuit in this case should be affirmed. The Fourth Circuit held that the plain language of Bankruptcy Code §541(c)(2) mandates that where trusts contain enforceable restrictions on the transfer of the beneficial interest, those restrictions must be recognized in bankruptcy and thereby operate to exclude the interest from the debtor's estate.

Upon the filing of a bankruptcy case, a bankruptcy estate is created by operation of Bankruptcy Code §541. Although this section broadly defines the content of the debtor's estate, it is recognized that certain property interests are excluded from it. Specifically, Bankruptcy Code §541(c)(2) excludes from the bankruptcy estate a debtor's interest in a trust which contains a restriction that is enforceable under "applicable nonbankruptcy law" on the transfer of the debtor's beneficial interest in the trust. The phrase "applicable nonbankruptcy law" is a broad term that refers to all laws, state and federal, under which a transfer restriction is enforceable. The phrase is not limited to state law but also embraces federal statutes such as the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

ERISA requires all qualified pension plans to include an anti-alienation provision. This provision imposes a restriction on the assignment and alienation of pension benefits. The purpose of the provision is to insure that the benefits under a qualified plan will actually be available to pensioners upon their retirement. The restrictions on

alienation demonstrate a strong public policy to safeguard retirement income for pensioners and their dependents. The anti-alienation provision required by ERISA is enforceable under applicable nonbankruptcy law. Because it imposes a restriction on the transfer of the beneficial interest that a debtor has in a qualified plan, the interest is excluded from the bankruptcy estate under Bankruptcy Code §541(c)(2).

Congress used the phrase "applicable nonbankruptcy law" to refer to both federal and state law in the Bankruptcy Code. There is no ambiguity in the phrase that would require the use of legislative history to interpret the phrase. A cardinal rule of statutory construction is that statutes should be read as a whole and that the same term should be given the same meaning throughout a statute. The term "applicable nonbankruptcy law" appears throughout the Bankruptcy Code, and at each occurrence the term refers to federal as well as state law. This interpretation is bolstered by Congress' use of the term "state law" in the Bankruptcy Code when a particular reference is limited only to state law.

Whenever possible, different federal laws should be read in harmony and not in conflict. The broad reading of the phrase "applicable nonbankruptcy law" utilized by the Fourth Circuit gives effect to both ERISA and the Bankruptcy Code. A major policy of ERISA is to protect the future pensions of individuals and to protect a stream of income for those individuals in their retirement. The anti-alienation provision of ERISA is integral to the accomplishment of this policy. A major policy of the Bankruptcy Code is to provide the debtor with a fresh start. By excluding ERISA qualified plan benefits from

the bankruptcy estate, both of these policies are preserved and advanced. Any exceptions to ERISA's anti-alienation provision should be left for Congress to implement.

Federal policy strongly supports the enforcement of ERISA's anti-alienation provision. This policy which has developed as a body of federal common law over the past 20 years consistently enforces ERISA's anti-alienation provision outside of the bankruptcy context. The Fourth Circuit's decision discourages the use of involuntary bankruptcy filings to accomplish indirectly what cannot be accomplished directly by creditors seeking to circumvent ERISA's spendthrift provisions. The Fourth Circuit's decision will also effectuate the policy of the Internal Revenue Code of 1986, as amended (the "Internal Revenue Code"), to provide favorable tax treatment for qualified pension plans by avoiding disruption through disqualification of an entire pension plan due to the bankruptcy filing of a single employee covered by the plan.

Inquiry need not be made under state spendthrift trust law to determine whether the pension plan is controlled by the settlor or the beneficiary or whether they are the same person. ERISA's anti-alienation provision prevents both voluntary and involuntary encroachment on vested benefits. Neither plan participants nor general creditors may reach the benefits under an ERISA qualified pension plan. Accordingly, no fact based state law inquiry associated with self-settled trusts is necessary. The enforceable restrictions placed on the transfer of pension interests by ERISA do not rest on the reality of the particular beneficiary-settlor-trust relationship but

rather on the status of the plan as ERISA qualified. Many practices encouraged by ERISA to encourage growth of pension funds conflict with state spendthrift trust law. The Bankruptcy Code and ERISA contain safeguards that adequately address the public policy concerns raised by Patterson. Accordingly, no public policy exception should be incorporated by the courts into ERISA.

In the event this Court were to determine that an ERISA qualified pension plan is property of the estate, then Shumate's interest in the pension plan is exempt from the bankruptcy estate under Bankruptcy Code §522(b)(2)(A). ERISA qualifies as an "other federal law exemption" available to debtors in bankruptcy to assist with their fresh start. The strong federal policy which has been developed by a body of federal common law operates effectively as a federal law exemption for ERISA qualified pension plans outside of bankruptcy cases. Neither case law nor legislation indicates any intent on the part of Congress to limit this recognized ERISA exemption to debtors outside of bankruptcy. Congress would not have enacted ERISA provisions it thought to be in conflict with the Bankruptcy Code or create significant qualification and administrative problems for qualified plans under the Bankruptcy Code and ERISA. ERISA's policy to protect pension plans from alienation and the Bankruptcy Code's fresh start policy mandate the extension of this exemption to bankruptcy cases.

ARGUMENT

I. A Debtor's Interest in an ERISA Qualified Pension Plan is Excluded from a Debtor's Bankruptcy Estate.

This case focuses on the right of a debtor-in-bankruptcy to retain the debtor's interest in a pension plan that contains an anti-alienation provision as required by the Employee Retirement Income Security Act of 1974. The analysis of this issue involves the interpretation and interplay of two federal laws: (1) the Bankruptcy Reform Act of 1978, 11 U.S.C. §101 *et seq.*,[2] and (2) the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq.* ("ERISA").

Bankruptcy Code §541 creates a bankruptcy estate upon the filing of a bankruptcy petition which estate includes any legal or equitable interest the debtor may have in property. Bankruptcy Code §541(c)(2) excludes certain of a debtor's property interests from the broad definition of property of the debtor's bankruptcy estate. This section provides:

> A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable *under applicable nonbankruptcy law is enforceable in a case under this title* [11 U.S.C. §101 *et seq.*].

11 U.S.C. §541(c)(2) (1986) (emphasis supplied).

ERISA creates a uniform system of federal law governing private pension plans. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987) (ERISA's crowning achievement is

[2] Further reference to Title 11, United States Code, will be designated as "Bankruptcy Code."

the reservation of federal authority to regulate the field of employee benefits). ERISA and its regulations provide uniform standards for creating, administering and funding pension plans. An integral part of this regulatory scheme is the inclusion of an anti-alienation provision that provides that benefits granted under the plan cannot be voluntarily or involuntarily assigned or alienated. *See* 29 U.S.C. §1056(d) (1988) and 26 U.S.C. §401(a)(13)(A) (1988).[3] The importance of this provision has been recognized by federal courts over ERISA's 20-year history.

The Court of Appeals for the Fourth Circuit held below that the term "applicable nonbankruptcy law" as used in Bankruptcy Code §541(c)(2) included ERISA. *See Shumate v. Patterson*, Pet. App. pp. 1a-11a. As ERISA imposes a restriction on the transfer of Shumate's beneficial interest in the ERISA qualified retirement plan, the plan benefits are excluded from the bankruptcy estate under Bankruptcy Code §541(c)(2). *Id.* Other Courts of Appeal have accepted this position. *See Velis v. Kardanis,*

[3] The Treasury regulations strongly support enforcement of the anti-alienation provision. *See* 26 C.F.R. §1.401(a-13)(b)(1) (1991). Congress gave authority to the Internal Revenue Service to define the anti-alienation provision of ERISA. H.R. Rep. No. 1280, 93rd Cong., 2d Sess. 359-60 (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5139. Generally courts are bound by legislative regulations issued pursuant to delegated power. Indeed such regulations can be set aside only if the administrative agency charged with administration of the statute exceeded its statutory authority or if the regulation is "arbitrary, capricious or an abuse of discretion or otherwise not in accordance with law." *Batterton v. Francis*, 432 U.S. 416, 425 (1977) (footnotes and citations omitted) (social security regulations).

949 F.2d 78 (3d Cir. 1991), *reh'g denied*, 949 F.2d 78 (3d Cir. 1991); *Forbes v. Lucas (In re Lucas)*, 924 F.2d 597 (6th Cir. 1991) *cert. denied* 111 S.Ct. 2275 (1991); *Anderson v. Raine (In re Moore)*, 907 F.2d 1476 (4th Cir. 1990); *see also*, concurring opinion in *John Hancock Mutual Life Ins. Co. v. Watson (In re Kincaid)*, 917 F.2d 1162 (9th Cir. 1990).

In contrast, Patterson argues that "applicable nonbankruptcy law" refers only to state spendthrift trust law.[4] In reaching this position, Patterson relies upon the authority of those cases in which other circuit courts invalidate the pension trusts of a debtor for public policy reasons when that debtor controls the settlor of the trust. *See Goff v. Taylor (In re Goff)*, 706 F.2d 574 (5th Cir. 1983); *Samore v. Graham (In re Graham)*, 726 F.2d 1268, 1269 (8th Cir. 1984); *Daniel v. Security Pacific Nat'l Bank (In re Daniel)*, 771 F.2d 1352, *cert. denied*, 475 U.S. 1016 (9th Cir. 1985); *Lichstrahl v. Bankers Trust (In re Lichstrahl)*, 750 F.2d 1488 (11th Cir. 1985). The policy followed in these cases ignores the anti-alienation provision embodied in ERISA qualified pension plans and applies state spendthrift trust law to determine whether the debtor's interest in a pension plan should be excluded from a bankruptcy estate.

[4] Bankruptcy Code §541(c)(2) makes no reference to "spendthrift trusts." This section merely refers to "trusts" generally. The statute addresses any trust that places a restriction on the transfer of a beneficial interest. ERISA mandates the creation of such a trust as part of its uniform requirements for establishing a qualified pension plan.

A. The Term "Applicable Nonbankruptcy Law" in 11 U.S.C. §541(c)(2) Is Not Limited to State Spendthrift Trust Law.

1. The Use of the Term "Applicable Nonbankruptcy Law" in the Bankruptcy Code is Not Ambiguous.

It is clear from the plain meaning of the phrase "applicable nonbankruptcy law" that it refers to whatever law may be applicable under the circumstances outside of bankruptcy. *See Toibb v. Radloff*, 111 S.Ct. 2197 (1991) (this Court adopted plain meaning of Bankruptcy Code in interpreting Bankruptcy Code §109). The phrase is intentionally broad so as to incorporate any law whether it be federal, state or local law – so long as the law in question is enforceable outside of bankruptcy. The broad reach of the term does not make it ambiguous. Nothing in the phrase suggests that it is intended to be restricted to any particular body of law. Clearly, if Congress had intended the phrase to apply to state law – or as Patterson argues, state spendthrift trust law – then Congress would have used that term. When Congress intended to refer to state law in other sections of the Code, it did so specifically.

Patterson argues that an ambiguity exists regarding the use of the term "applicable nonbankruptcy law" in Bankruptcy Code §541(c)(2). Because of this ambiguity, Patterson argues that the plain meaning of this term should not be used in defining the term and that legislative history should be consulted to interpret the term. This argument ignores the manner in which the terms "applicable nonbankruptcy law" and "state law" are used in other portions of the Bankruptcy Code.

Patterson agrees that statutes should be read as a whole and not in isolated parts. *Brief for the Petitioner*, p. 26 [citing *United States v. Morton*, 467 U.S. 822, 828 (1984)]. This Court has stated that statutory construction is a holistic endeavor. *See United Sav. Ass'n Tex. v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365 (1988). Although a provision may seem ambiguous in isolation, when that provision is read in the context of the statutory scheme in which it has been used repeatedly, then its meaning becomes clear. *Id.*

The term "applicable nonbankruptcy law" appears throughout the Bankruptcy Code and its related laws. In the following sections, this term was used by Congress to refer to federal law and also occasionally to refer to state law:

> (1) in 11 U.S.C. §108(a)(b) & (c) the phrase "applicable nonbankruptcy law" refers to the extension of the statute of limitations by which an entity could pursue a federal or state law claim;
>
> (2) in 11 U.S.C. §101(56)(F) the phrase "applicable nonbankruptcy law" is used to refer to federal copyright law;
>
> (3) in 11 U.S.C. §365(n)(1)(B) the phrase "applicable nonbankruptcy law" is used to refer to the protection accorded intellectual property by federal law;
>
> (4) in 11 U.S.C. §1125(d) the phrase "applicable nonbankruptcy law" is used to exempt post-petition disclosure and solicitation of statements from the requirements of federal or state securities laws;

(5) in 11 U.S.C. §1126(b)(1) the phrase "applicable nonbankruptcy law" is used to refer to the validity of acceptances of a plan that were received prior to the commencement of the case if there was compliance with federal or state securities laws;

(6) in 28 U.S.C. §1409(c)(d) & (e) the similar phrase "applicable nonbankruptcy venue" defines for venue purposes the proceedings arising under Title 11 or related to a case under Title 11 such as federal causes of action; and

(7) in 28 U.S.C. §1411 the phrase "applicable nonbankruptcy law" refers to the determination of the right of a jury trial in Title 11 cases for personal injury or wrongful death actions that arise under federal law such as the Federal Tort Claims Act.

The term "applicable nonbankruptcy law" should be given the same meaning in each part of the Bankruptcy Code in which it appears. In each of the above occurrences, the term "applicable nonbankruptcy law" refers to either federal law or both federal and state law. Accordingly, the use of this term in Bankruptcy Code §541(c)(2) should be interpreted to refer to both federal law and state law.[5]

[5] Counsel for *amicus curiae*, David Tatge, Trustee, also argues that the meaning of the term "applicable nonbankruptcy law" in the Bankruptcy Code is ambiguous. He asserts that the use of this term in 11 U.S.C. §522(b)(2)(B), a section that excludes tenant by the entirety property from the bankruptcy estate, refers *only* to state law because he argues

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When Congress specifically wanted to refer to state law in the Bankruptcy Code it used the term "state law." The use of the term "state law" in the following sections of Title 11 reveals a congressional familiarity with the phrase:

(1) in 11 U.S.C. §109(c)(2) the term "state law" is used to refer to the authorization of certain entities to be a debtor under Chapter 9 of Title 11;

(2) in 11 U.S.C. §362(b)(12) the term "state law" is used in limiting the length of the automatic stay when foreclosing on ship/fleet mortgages;

(3) in 11 U.S.C. §522(b)(1) and (2) the term "state law that is applicable" is used in defining the types of exemptions available to a debtor;

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state law and not federal law defines property interests. Accordingly, he asserts that this reference creates an ambiguity in the meaning of the term "applicable nonbankruptcy law".

This argument ignores the existence of federal law such as District of Columbia law that does define a debtor's property interests. *See* D.C. Code Ann. §45-216 (1990 Repl. Vol.) (law defining tenant by the entirety property in the District of Columbia). The District of Columbia is an area that is under the ultimate legislative authority of the Congress; as such, its laws are a type of federal law. *See* U.S. Const., art I, §8, cl. 17; and D.C. Code Ann. §1-201 (1990 Repl. Vol.). The term "applicable nonbankruptcy law" was utilized in the broadest sense possible to encompass any law outside of bankruptcy dealing with tenants by the entirety property. It certainly was not intended to be restricted solely to state law.

(4) in 11 U.S.C. §903(1) the term "state law" is used to describe the interplay of state law with federal bankruptcy law in dealing with municipal bankruptcies;

(5) in 11 U.S.C. §523(a)(5) the term "in accordance with state or territorial laws" is used to define the non-dischargeability of state law support orders in bankruptcy cases; and

(6) in 11 U.S.C. §1145(a) the term "state or local laws" is used to refer to an exemption from state securities laws for certain sale offers.

These examples demonstrate that Congress knew how to refer to state law when it intended to limit a reference in the Bankruptcy Code to state law. The Bankruptcy Reform Act of 1978 was the result of careful drafting and study. *See* H.R. Rep. No. 595, 95th Cong. 1st Sess. 1, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6325, and S. Rep. No. 989, 95th Cong. 2d Sess. 1, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787. Each term that is used in the Bankruptcy Code should be given effect. The term "applicable nonbankruptcy law" as used in the context of the entire Bankruptcy Code does not refer exclusively to state law; accordingly, this Court should rule that the term "applicable nonbankruptcy law" refers to federal and state law.[6]

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[6] Even if the Court were to examine the legislative history of 11 U.S.C. §541(c)(2) regarding the term "applicable nonbankruptcy law," as Patterson suggests it should, this Court would discover that the legislative history is inconclusive. The Senate and House Reports only state that 11 U.S.C. §541(c)(2) excludes spendthrift trusts from the bankruptcy estate. The

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2. Interpreting the Term "Applicable Nonbankruptcy Law" to Include State and Federal Law Is Not Inconsistent With 11 U.S.C. §522(d)(10)(E) Nor Does Such an Interpretation Render That Section Superfluous.

Patterson argues that a broad reading of the term "applicable nonbankruptcy law" is inconsistent with 11 U.S.C. §522(d)(10)(E). Bankruptcy Code §522(d)(10)(E) defines the federal exemption for a debtor's future earnings.[7] Patterson argues that because the federal exemption includes a reference to an ERISA qualified pension

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legislative history does not mention the term state law. *See* H.R. Rep. No. 595, 95th Cong. 2d Sess. 1, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 5869; and S. Rep. No. 989, 95th Cong. 2d Sess. 83, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5869.

Additionally, the one time Congress amended the anti-alienation provision since adoption of ERISA it repeatedly referred to the anti-alienation section as "the spendthrift trust provisions of . . . ERISA." S. Rep. No. 575, 98th Cong. 1st Sess. 1, 3 and 18-19, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2547, 2549 and 2564-65.

[7] The Bankruptcy Code provides for the existence of two alternative sets of exemptions. Bankruptcy Code Sections 522(b)(1) and 522(d) define the federal exemptions that exist under the Bankruptcy Code, and Bankruptcy Code Section 522(b)(2) permits a state to create its own exemptions for debtors which also encompasses federal exemptions other than those set forth in subsection (d). Bankruptcy Code Section 522(b) permits the debtor to select between the two alternative sets of exemptions unless the state has opted out. In the instant case, Shumate could only have chosen the state exemptions because Virginia has opted out of the federal exemptions. Va. Code §34-3.1 (1990).

plan and since an item must be property of the bankruptcy estate before it can be exempted from the estate, then by reading the term "applicable nonbankruptcy law" to include federal law, Bankruptcy Code §522(d)(10)(E) is made superfluous. Such a reading is not mandated by the Bankruptcy Code.

Bankruptcy Code §522(d)(10)(E) deals with all types of future earnings available to a debtor. It includes Social Security, unemployment compensation, veteran's benefits, disability benefits and pension benefits. Even as it applies to pension plans, this section is not specifically directed at ERISA qualified plans. Although, such plans are included in this section, the exemption is broad enough to include other types of pension plans besides ERISA qualified plans. For example, individual retirement accounts are covered by Bankruptcy Code §522(d)(10)(E). However, such accounts are not subject to the anti-alienation provision of ERISA and, accordingly, are not excluded from the bankruptcy estate by operation of Bankruptcy Code §541(c)(2). Therefore, the exemption afforded under Bankruptcy Code §522(d)(10)(E) would be necessary in order to exempt these types of retirement funds.[8]

Accordingly, reading the term "applicable nonbankruptcy law" to include ERISA qualified benefits will not make this entire section superfluous. The inclusion by

[8] The Court of Appeals for the Third Circuit has suggested that the exemption afforded under Bankruptcy Code §522(d)(10)(E) serves also to protect distributions of plan benefits which the debtor has a present and immediate right to receive. *See Velis v. Kardanis*, 949 F.2d 78, 81 (3d Cir. 1991).

Congress of ERISA qualified plans in this Bankruptcy Code Section serves only to insure that all types of future income for a debtor will be available for the debtor's fresh start. The existence of some overlap between Bankruptcy Code §§522(d)(10)(E) and 541(c)(2) is not significant and certainly does not require that ERISA qualified plans be included in the bankruptcy estate. If some reconciliation is needed between these two provisions, this is a legislative responsibility for Congress and not for the courts to assume.

3. A Broad Interpretation of the Term "Applicable Nonbankruptcy Law" in the Bankruptcy Code to Include State and Federal Law Harmonizes ERISA and the Bankruptcy Code.

A broad reading of the term "applicable nonbankruptcy law" allows ERISA to be construed consistently with the Bankruptcy Code. Whenever possible, a court should read statutes in harmony and not in conflict. *See Morton v. Mancari*, 417 U.S. 535, 551 (1974). Recently, this Court applied this principle of statutory construction to ERISA in *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 110 S. Ct. 680, 686-87 (1990), a case involving a union official who had been convicted of embezzling union funds. After the embezzlement was uncovered, the plan's administrators refused to pay any benefits to Guidry from the pension plan arguing that Guidry had forfeited his rights to such benefits because of his criminal activity. Guidry sued to recover his benefits. Although rejecting the forfeiture argument, the district court

imposed a constructive trust on the plan benefits. *Guidry*, 110 S. Ct. at 683-85.

On appeal, this Court examined and compared 29 U.S.C. §501(b) of the Labor-Management Reporting Disclosure Act of 1954 ("LMRDA") providing for the recovery of damages for a violation of the LMRDA with 29 U.S.C. §1056(d) (1988), the anti-alienation provision of ERISA. This Court first looked to the savings provision of ERISA, 29 U.S.C. §1144(d) (1988), which provides that nothing in ERISA shall alter, amend, modify, invalidate, impair or supersede any law of the United States. *Guidry*, 110 S. Ct. at 686-87. Instead of ruling that ERISA conflicted with the LMRDA, this Court harmonized the laws in order to give effect to the provisions of both federal laws. *Id.*

Here, an appropriate reading of the term "applicable nonbankruptcy law" will harmonize ERISA and the Bankruptcy Code. A main policy of ERISA is to protect the future pensions of individuals and to provide a stream of income for those individuals in their unemployable old age. *See* 29 U.S.C. §§1001(b) and (c) (1988); *see also, Guidry*, 110 S. Ct. at 687. An integral part of this protection is the required inclusion of an anti-alienation provision in ERISA qualified plans. *See* 29 U.S.C. §1056(d) (1988) and 26 U.S.C. §401(a)(13) (1988). Similarly, a major policy of the Bankruptcy Code is to provide an opportunity for the debtor to have a fresh start. *Perez v. Campbell*, 402 U.S. 637, 648 (1971); *Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. No. 137, 93rd. Cong., 1st Sess., pt. I, at 75 (1973); S. Rep. No. 989, 95th Cong., 2d Sess. 6, 12-13, *reprinted in* 1978 U.S. Code Cong. & Admin.

News 5787, 5792, 5798-99. By giving effect to the anti-alienation provision of ERISA and excluding an ERISA qualified pension plan under 11 U.S.C. §541(c)(2) the purpose of both laws will be advanced. The debtor will have a stream of future income with which the debtor can fund a post-petition fresh start.[9]

B. Public Policy as Enunciated in the Bankruptcy Code and ERISA Supports the Exclusion of a Debtor's Interest in an ERISA Qualified Pension Plan from the Debtor's Bankruptcy Estate.

The body of federal common law that has developed over the past 20 years interpreting ERISA establishes a strong federal policy to enforce the anti-alienation provision that is required in ERISA qualified pension plans. 29 U.S.C. §1001 (1988), *see also, Guidry*, 110 S. Ct. at 687,

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[9] The inability to protect an interest in a pension plan from the bankruptcy trustee would seriously threaten an elderly debtor's ability to obtain a fresh start. The interest that a debtor has in a qualified retirement plan is usually dependent upon the debtor's years of service or the years the debtor has worked and as to which contributions were made on the debtor's behalf. Older debtors will have less time to accumulate new or additional retirement benefits and accordingly will be the most exposed if their interests in a pension plan are not protected. Congress enacted the anti-alienation provision contained in ERISA to ensure that an employee's accrued benefits are actually available for retirement purposes. A fresh start to a debtor means protecting this interest. Accordingly, there is no conflict between the policies of the Bankruptcy Code and ERISA with regard to protection of employee benefit plans. *See* Flint, *ERISA: Anti-Alienation Superiority in Bankruptcy*, 94 W.Va. Law Rev. 411, 462 (1991-92).

Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359 (1980). This policy has been enunciated in a variety of federal cases. The Court of Appeals for the Fourth Circuit in *Smith v. Mirman* declared invalid an assignment of an ERISA qualified pension plan prior to a bankruptcy filing. The court observed, "[w]e see a danger in eroding through exception the anti-alienation policy of ERISA. That entire legislation was aimed at guaranteeing the security of retirement income for American workers." *Smith v. Mirman (In re Mirman)*, 749 F.2d 181, 184 (4th Cir. 1984).

In *Tenneco, Inc. v. First Virginia Bank of Tidewater*, 698 F.2d 688 (4th Cir. 1983) a bank sought to garnish a debtor's accrued interest in an ERISA qualified thrift and stock ownership plan. On appeal, the Court of Appeals for the Fourth Circuit ruled that the debtor's interest in the plan was exempt from a third party creditor's garnishment. That court reasoned, "[t]he funds here had been accumulated under a general plan for retirement, and the statutory scheme clearly contemplates that they should remain available for that purpose, even though the employee might obtain employment with another employer having a qualified plan, or quit, or otherwise become entitled to a lump sum distribution." *Tenneco, Inc.*, 698 F.2d at 690. *See also McLean v. Central States, Southeast and Southwest Areas Pension Fund (In re McLean)*, 762 F.2d 1204 (4th Cir. 1985) [Chapter 13 plan cannot be funded by direct payments from debtor's retirement plan to the trustee in that the retirement plan benefits were not property of the estate (spendthrift trust analysis)], *Retirement Fund Trust of Plumbing v. Franchise Tax Board*, 909 F.2d 1266, 1282-84 (9th Cir. 1990); *Herberger v. Shanbaum*, 897 F.2d 801 (5th Cir. 1990); *Traveler's Ins. Co. v. Fountain City Federal Credit Union*, 889 F.2d 264 (11th Cir. 1989); and *General Motors Corp. v. Buha*, 623 F.2d 445 (6th Cir. 1980). This body of federal common law recognizes the importance of ERISA's anti-alienation provision toward advancing the purposes of ERISA. As this Court stated in *Guidry*:

> Section 206(d) [29 U.S.C. §1056(d)] reflects a considered Congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents who may be, and perhaps usually are, blameless) even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task.[10]

Guidry, 110 S.Ct. at 687.

The body of federal common law illustrated by these cases demonstrates that ERISA's anti-alienation provision is routinely enforced outside of the bankruptcy context. While Patterson recognizes this body of federal common law, he argues that it should not be applied in a bankruptcy case. *See Brief for the Petitioner*, at p. 19. If the court were to adopt such a position, then a debtor outside of a

[10] When Congress wanted to create an exception to the anti-alienation provision of ERISA, it did so. In 1984, Congress created an exception for qualified domestic relations orders. *See* 29 U.S.C. §1056(d)(3). *See also*, S. Rep. No. 575, 98th Cong. 1st Sess. 19, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2547, 2565. This subsection defines the sole, legislative exception to ERISA's anti-alienation provision.

bankruptcy case would be provided greater protection than a debtor in a bankruptcy case, an untenable position.

This Court has recognized (1) that there should be uniformity of treatment of property interests whether or not a debtor has filed a bankruptcy case and (2) that a creditor should not receive a windfall because of a bankruptcy filing. *See Butner v. U.S.*, 440 U.S. 48, 55 (1978). Failing to enforce ERISA's mandated anti-alienation provision would ignore this admonition. Not only would it create a disparity in treatment between a debtor who had filed bankruptcy and a debtor who had not, but also it would allow a creditor to receive a windfall from a pensioner's bankruptcy. Such treatment would encourage the filing of involuntary bankruptcies so that creditors could obtain a debtor's interest in a pension plan.

Also, such treatment would be contrary to ERISA's policy of enforcing the anti-alienation provision in order to protect a pensioner's interest in a pension plan. ERISA's pre-emption provision protects qualified plans from having to comply with vagaries of state spendthrift law before they are exempt from creditor attack. *See*, 29 U.S.C. §1144(a) (1988). In effect, Patterson's argument would force the qualified plan to comply with each individual state's spendthrift trust law to ensure the total viability of the anti-alienation provision. In some states, the funds in a spendthrift trust can be reached by certain types of creditors. In other states, spendthrift trusts have been eliminated altogether. *See e.g.*, N.C. Gen. Stat. §36A-11S (Supp. 1981). Requiring pension plans to comply with the spendthrift trust law of each state would result in inconsistent application of the Bankruptcy Code

and ERISA.[11] The uniformity Congress sought to achieve when it adopted ERISA would have been circumvented.

C. The Bankruptcy Code and ERISA Adequately Protect a Trustee from Debtors Who Exert Control Over a Pension Plan.

No credence should be given to the argument that an equitable "public policy" exception should be applied to void ERISA's anti-alienation provision when a trust beneficiary has sufficient control to terminate a retirement plan. This suggested "public policy" exception is derived from the spendthrift trust laws of some states that deem a person in control of the creator of a trust to be the settlor of the trust. The "public policy" exception treats these trusts as self-settled because of the potential mischief that could result from the control over the trust assets. Incorporation of such a "public policy" exception into ERISA

[11] Allowing Patterson to obtain the pension benefits could destroy the entire Plan's tax qualification rendering the Plan and its benefits taxable to Plan participants and beneficiaries. Private Letter Ruling No. 8910035, CCH Letter Ruling Reports (1988). Although Private Letter Rulings cannot be cited as precedent, 26 U.S.C. §6110(j)(3), this letter ruling demonstrates the very real possibility for adverse consequences to other plan participants, and it further illustrates why ERISA's public policy to protect plan benefits should override any competing policy or concern. Disqualification of a plan for one member disqualifies the plan for all other participants as well. In this case, disqualification would have devastating consequences as the 400 other plan participants may have to retroactively recognize the funds immediately as gross income and the exempt status of the Plan would be lost.

would frustrate ERISA's policies and purposes and would effectively rewrite the statute.

The preemption provision of ERISA was designed to protect qualified retirement plans from having to comply with the spendthrift trust laws of a given participant's state of domicile before the benefits under the plan were protected from alienation including creditor process. Some large companies have employees in each of the 50 states. Many practices permitted under ERISA to encourage the growth of pension funds constitute violations of the spendthrift trust laws of some states. Such practices include: having the right to make withdrawals from the plan in the event of hardship or termination, having the right to borrow money from the plan, and having the right to make contributions to the plan. *See e.g., Johnson v. Fenslage (In re Johnson)*, 724 F.2d 1138 (5th Cir. 1984) (applying Texas law) (plan deemed self-settled where debtor's interest includes his own contributions). Furthermore, these concerns are adequately addressed under the protection already available in the Bankruptcy Code and by ERISA.

For example, Bankruptcy Code §548, the fraudulent conveyance provision, allows a trustee to avoid a debtor's transfer of property that was made within one year of the filing of the bankruptcy petition and that was made with the intent to hinder, delay or defraud creditors. Thus, if a debtor exerts control over a corporation (as opposed to having the mere potential to do so) that is prejudicial to the interests of the debtor's creditors, then Bankruptcy Code Section 548 empowers the trustee-in-bankruptcy to avoid any transaction resulting in a depletion of the bankruptcy estate that stems from the control,

and to recapture the property for the benefit of creditors. This fraudulent conveyance provision sufficiently addresses the public policy concerns raised by Patterson. *See, In re LaFata*, 41 B.R. 842, 844 (Bankr. E.D. Mich. 1984) (dicta).[12]

In this case, however, no suggestion has been made that Shumate ever exercised any control over the corporation to transfer assets to the Plan in order to defraud, hinder, or delay creditors. In fact, the bulk of Shumate's interest in the Plan accrued prior to Shumate's becoming president of Coleman and prior to Shumate's obtaining control of Coleman. The Plan was established in 1963. Shumate served as president of Coleman from 1979 until 1982; accordingly, only during a three-year period out of a 30-year career did Shumate have the ability to control Coleman. There were no modifications or amendments to the Plan during Shumate's tenure as president of Coleman. The Court of Appeals for the Fourth Circuit specifically recognized that Shumate only had potential control over Coleman, the settlor of the Plan. *See Shumate v. Patterson*, Pet. App. 1a, 7a, n.3. Any control that Shumate might have been able to exercise over the Plan would have had no impact over his Plan interest.[13]

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[12] Bankruptcy Code Section 547, the preference provision, also could be used to avoid improper transfers to a pension plan. *See Sterling Die Casting Co., Inc. v. Local 365 UAW Welfare and Pension Fund (In re Sterling Die Casting Co., Inc.)*, 118 B.R. 205 (Bankr. E.D.N.Y. 1990). Again the record does not disclose any basis for this type of action.

[13] Even if one accepts the application of the public policy exception applicable to state spendthrift trusts, any control

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Patterson is not the proper party to raise these concerns. If such a transfer had occurred, then it would have been Creasy, the trustee-in-bankruptcy for Coleman, who would have been the proper party to raise these issues. Given these facts there is no reason to apply Patterson's asserted public policy exception to bring Shumate's pension into the bankruptcy estate because there has been no harm to Shumate's creditors.

Additionally, ERISA offers protection against such mischievous conduct. ERISA and the legislative regulations[14] that interpret it contain (1) limits on the amount of funds that can be sheltered under a plan by an individual, 26 U.S.C. §415(c) and (d) (1988 & Supp. I 1989); (2) limits on the ability of an entity to develop a short-term plan, 26 C.F.R. §1.401-1(b)(2) (1991); and (3) qualifications on the type and number of employees that must be

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that Shumate exercised over Coleman does not warrant the application of the policy. It has been established that "limited control [over a pension plan] may be permitted if its exercise would create such a hardship for the debtor as to discourage its exercise except in dire circumstances." *In re Pettit*, 61 B.R. 341, 346 (Bankr. W.D. Wash. 1986). The control that Shumate *possibly* could have exercised is similar to the hardship control that courts have allowed beneficiaries to exercise without destroying the non-alienation aspect of pension benefits. *See Gennet v. ICMA Retirement Corp. (In re Forbes)*, 65 B.R. 58 (Bankr. S.D. Fla. 1986) (ability to obtain benefits if beneficiary terminates employment is not sufficient control to defeat "spendthrift nature" of pension). Further, such inclusion suggests that Shumate had unfettered control over the Coleman Plan which is simply inconsistent with ERISA's fiduciary provisions. *See* ERISA §§401-414.

[14] See n. 3, *supra* at 10 regarding legislative regulations.

covered to enjoy benefits of an ERISA-qualified plan, 26 U.S.C. §410(b) (1988). Given these existing federal protections, it is unnecessary for this Court to impose state spendthrift law protection on the Bankruptcy Code or on ERISA. Again, if such an exception is to be made, Congress, not the courts, should legislate the change. *Guidry*, 110 S.Ct. at 686-87.

D. Shumate's Interest in the Coleman Retirement Plan is Excluded from his Bankruptcy Estate.

The plain meaning of Bankruptcy Code §541(c)(2) excludes Shumate's interest in the pension trust from the bankruptcy estate because the Plan contains the anti-alienation provision required by ERISA. The anti-alienation provision imposes a restriction on the transfer of Shumate's beneficial interest in the Plan which is enforceable under applicable nonbankruptcy law. The use of the term "applicable nonbankruptcy law" in the Bankruptcy Code does not preclude the application of ERISA. Rather, the policies of the Bankruptcy Code and ERISA support a determination that ERISA qualified pension plans should be excluded from a debtor's bankruptcy estate. Accordingly, this Court should affirm the holding by the Fourth Circuit that Shumate's interest in the Plan is excluded from his bankruptcy estate.

II. The Debtor's Interest in the ERISA Qualified Pension Plan Would in Any Event Qualify for Exemption Under 11 U.S.C. §522(b)(2)(A) of the Bankruptcy Code.

Even though the Court of Appeals did not decide the issue whether an ERISA qualified pension plan was

exempt from the bankruptcy estate, Patterson seeks to have this Court determine this issue in the event it concurs with Patterson that applicable non-bankruptcy law under Bankruptcy Code §541(c)(2) does not include ERISA. The Court of Appeals did not reach this issue because its conclusion that the Plan was not property of the bankruptcy estate made it unnecessary for it to do so. The Court of Appeals did note, however, that it found the court's opinion in *In re Komet*, 104 B.R. 799 (Bankr. W.D. Tex. 1989), to be persuasive. Pet. App., p. 11a. *Komet* held that a debtor's interest in an ERISA qualified pension plan should be subject to exemption under Bankruptcy Code §522(b)(2)(A) because ERISA is "federal law."[15]

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[15] The court in *Komet* noted that the principle impediment to such a holding was the "strong dicta" in *In re Goff*, 706 F.2d 574 (5th Cir. 1983), that had been followed by a majority of jurisdictions. The court examined the weakness of *Goff* and concluded its analysis was flawed for four reasons: (i) *Goff* mistakenly characterizes the function of the anti-alienation language as applying to tax treatment only; (ii) *Goff* misinterprets the structure and purpose of the Bankruptcy Code and finds "a Congressional policy" antithetical to the retention of retirement benefits where precisely the opposite policy is indicated; (iii) *Goff* misinterprets the legislative history of the Bankruptcy Code §522(a); and (iv) *Goff* mistakenly presumed that the Bankruptcy Code implicitly repealed ERISA anti-alienation provision. *In re Komet*, B.R. 104 at 809-16.

A. Bankruptcy Code §522(b)(2)(A) Permits Debtors to Avail Themselves of Federal Exemptions Such as that Created by ERISA.

1. The Anti-Alienation Provision in ERISA Constitutes a Federal Exemption Recognized Under the Bankruptcy Code.

Section 522 of the Bankruptcy Code allows debtors to retain certain of their property by exemption. This section serves to advance one of the most important purposes of bankruptcy policy: to provide a fresh start for debtors. *Perez v. Campbell*, 402 U.S. 637, 648 (1971); *Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. No. 137, 93rd Cong., 1st Sess., pt. I, at 75 (1973); S. Rep. No. 989, 95th Cong., 2d Sess. 6, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5792.

Bankruptcy Code §522(b)(2)(A) provides:

> Notwithstanding §541 of this Title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or in the alternative, paragraph (2) of this subsection. . . . Such property is –
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> (1) property that is specified under subsection (d) of this section . . . [16]

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[16] Congress added in subsection (d) a list of generic federal exemptions as an alternative exemption scheme. *See* n. 7, *infra* at 17. It gave the debtor a choice between the generic federal exemptions listed in subsection (d) of Bankruptcy Code §522 or the exemptions to which the debtor was entitled otherwise under "other federal law" and the law of the state of the debtor's domicile. 11 U.S.C. §522(b) (1988); H.R. Rep. No. 595,

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> (2) Any property that is *exempt under federal law other than subsection (d) of this section*, or state or local law that is applicable on the date of the filing of the petition . . . .

11 U.S.C. §522(b)(2)(A) (1988 & Supp. II 1990) (emphasis added).

The provision of ERISA that mandates anti-alienation, 29 U.S.C. §1056(d)(1) (1988), constitutes an exemption under "federal law" which in turn can be exempted by a debtor from property of the estate under Bankruptcy Code §522(b)(2)(A). *In re Komet*, 104 B.R. 799 (Bankr. W.D. Tex. 1989); *Barr v. Hinshaw (In re Hinshaw)*, 23 B.R. 233 (Bankr. D. Kan. 1982); *In re Messing*, 114 B.R. 541 (Bankr. E.D. Tenn. 1990); *In re Starkey*, 116 B.R. 259 (Bankr. D. Colo. 1990); *In re Suaxez*, 127 B.R. 73 (Bankr. S.D. Fla. 1991); *In re White*, 131 B.R. 526 (Bankr. D. Mass. 1991). As this Court has previously observed, Congress adopted 29 U.S.C. §1056(d) because otherwise "ERISA plan benefits could be attached or garnished." *Mackey v. Lanier Collections Agency & Service, Inc.*, 486 U.S. 825, 837 (1988) (dicta).

ERISA contains a preemption provision, 11 U.S.C. §1144(a), that was intended by Congress to create uniformity in employee benefit law without the necessity of reference to varying state laws. Flint, *ERISA: Anti-Alienation Superiority in Bankruptcy*, 94 W.Va. L.R. 411, 439

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95th Cong., 1st Sess. 360-363, *reprinted in* U.S. Code Cong. & Admin. News 5963, 6315-19. Most states have eliminated this choice by "opting out" of the federal exemption scheme. 3 L. King, *Collier on Bankruptcy* ¶522.02 (15th ed. 1991).

(1992). The provision in ERISA that compels private employee pension plans to incorporate an anti-alienation provision, 29 U.S.C. §1056(d), has been held by most courts to override the operation of state law collection statutes on account of the preemption provision. A body of federal common law has developed around ERISA's anti-alienation provision holding that it insulates retirement benefits in a qualified plan from liability under state law levy or attachment. *Traveler's Ins. Companies v. Fountain City Fed. Credit Union*, 889 F.2d 264, 266 (11th Cir. 1989); *General Motors Corp. v. Buha*, 623 F.2d 455, 460 (6th Cir. 1980); *Commercial Mortgage Ins. Inc. v. Citizens Nat'l Bank*, 526 F. Supp. 510, 513 (N.D. Tex. 1981); *Retirement Fund Trust of Plumbing v. Franchise Tax Board*, 909 F.2d 1266, 1283-86 (9th Cir. 1990); *Northwest Airlines, Inc. v. Roemer*, 603 F.Supp. 7, 9-11 (D. Minn. 1984); *Tenneco, Inc. v. First Virginia Bank of Tidewater*, 698 F.2d 688, 690-91 (4th Cir. 1983); and *Smith v. Mirman (In re Mirman)*, 749 F.2d 181, 183-84 (4th Cir. 1984). The anti-alienation provision of ERISA as developed by this body of federal common law functions effectively as an exemption created by federal law because it shelters the debtor's interest in this property from creditor process. Accordingly, to the extent not excluded from the bankruptcy estate, ERISA creates a federal exemption that is applicable in bankruptcy under the "other federal law" rubric of Bankruptcy Code §522(b)(2)(A). *In re Komet*, 104 B.R. at 805-06.

2. Congress Expressed no Intent to Restrict The ERISA Exemption That is Available Outside of a Bankruptcy Case to a Debtor in Bankruptcy.

The federal exemption for ERISA qualified pension plans should be extended to debtors in bankruptcy cases. Congress never indicated any intention to eliminate the protection afforded to ERISA qualified plan benefits under the body of federal common law to pensioners who file bankruptcy. As the bankruptcy court stated in *Komet*, "had Congress intended to exclude ERISA regulated plans from the 'other federal law' rubric, it would certainly have done so in the Bankruptcy Code itself." *In re Komet*, 104 B.R. at 814. If the rule were otherwise, creditors would be able to reach a pensioner's interest in a retirement plan simply by forcing the pensioner into bankruptcy. The law has long discouraged differences between the substantive law of bankruptcy and debtor creditor law generally. *Butner v. United States*, 440 U.S. 48, 55 (1978) ("Uniform treatment of property . . . serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from 'receiving a windfall merely by reason of the happenstance of bankruptcy'"). Absent a clear directive from Congress to the contrary, the exemption for ERISA plan benefits should be the same both inside and outside of bankruptcy.

3. Adoption of Bankruptcy Code §522(b)(2)(A) Did Not Change Prior Law.

When Congress enacted Bankruptcy Code §522 as part of the new Bankruptcy Code, it intended to continue

the exemption scheme that had existed previously under the Bankruptcy Act of 1898. Congress did not intend to change the nature and extent of existing exemptions. *See In re Komet*, 104 B.R. at 811 [citing *Report of the Commission on Bankruptcy Laws of the United States*, H.R. Doc. No. 137, 93rd Cong., 1st Sess. pt. I, at 16 (1973)]. Rather, those kinds of issues were left to be controlled by the statute which confers the exemption and the case law which construes it. 1A J. Moore and L. King, *Collier on Bankruptcy*, ¶6.17 (14th ed. 1974). The exemption scheme under Bankruptcy Code §522 basically honored whatever exemptions the debtor was entitled to receive outside of bankruptcy whether those exemptions were state or federal in origin.[17] Accordingly, there was no intent on the part of Congress to change, repeal or delete any exemption available to debtors under ERISA at the time it adopted the new Bankruptcy Code in 1979.[18]

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[17] Section 6 of the Bankruptcy Act of 1898 allowed debtors to avail themselves of exemptions which were prescribed by the laws of the United States or by the state law in force at the time of the filing of the petition in the state wherein the bankrupts were domiciled. This section of the Bankruptcy Act of 1898 was reenacted in the Bankruptcy Code as §522(b)(2)(A) substantially without change. H.R. Rep. No. 595, 95th Cong., 1st Sess. 126, 360, *reprinted in* 1978 U.S. Cong. & Admin. News 5963, 6316-19.

[18] It has been suggested by a number of courts that the savings provision in ERISA effectively subordinates ERISA's provisions to those contained in the Bankruptcy Code. *See In re Komet*, 104 B.R. at 815; *McLean*, 762 F.2d 1204 (4th Cir. 1985). This Court has refused on previous occasions to interpret the savings provision so broadly. *See Guidry*, 110 S.Ct. 680. With

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B. Patterson's Arguments That There is no ERISA Bankruptcy Exemption Under Bankruptcy Code §522(b)(2)(A) Are Without Merit.

Patterson advances two reasons why ERISA does not constitute an exemption under federal law. First, Patterson argues that such an exemption would render Bankruptcy Code §522(d)(10)(E) meaningless. Second, Patterson argues that this treatment would be contrary to the legislative history of Bankruptcy Code §522. Neither of these arguments is well founded.

1. There is no Conflict Between Bankruptcy Code §§522(b)(2)(A) and 522(d)(10)(E).

There is no internal conflict within the provisions of Bankruptcy Code §522. The scheme Congress adopted for exemptions under Bankruptcy Code §522 gives debtors a choice between the exemptions available under subsection (d) of Bankruptcy Code §522 and the exemptions otherwise available under federal law or under the law of the state in which the debtor was domiciled. By opting out of the federal exemption scheme, Virginia eliminated this choice for its citizens. Accordingly, Shumate was not entitled to elect the exemptions listed under subsection (d) of Bankruptcy Code §522.

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regard to the exemption scheme, Congress did not intend to change the prior law. Accordingly, the Court should not interpret the savings provisions of ERISA to effect an implied repeal of the ERISA spendthrift trust provisions. *Id.*

But Patterson's assertion to the contrary notwithstanding, even if Shumate was a resident of a non-opt-out state, he would not have been restricted to the exemptions under Bankruptcy Code §522(d). Rather, he would have been able to elect to proceed under those exemptions or under the exemptions otherwise available under federal law and the exemptions available under the laws of the Commonwealth of Virginia. The list of exemptions that would otherwise be available under subsection (d) of Bankruptcy Code §522 represents an alternative exemption scheme. It includes provisions for homesteads, cars, clothing and other enumerated categories of property in addition to retirement benefits.[19] If a debtor chooses to proceed under Bankruptcy Code §522(d), then as a consequence that debtor must forego the existing exemptions under the debtor's state of domicile as well as any exemption that might otherwise be available under federal law.[20] The exemption for retirement benefits under

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[19] Indeed there are many categories of exempt property such as Social Security benefits that are totally exempt under both of the alternative exemption schemes. There are other categories of exempt property that are exempt under only one or the other of the exemption schemes depending upon the debtor's choice.

[20] For example, a married debtor may be able to exempt real estate owned by the debtor and his wife as tenants by the entirety under Bankruptcy Code §522(b)(2)(B). If the debtor were to elect to proceed under Bankruptcy Code §522(d), however, he would not be able to avail himself of the tenants by the entirety exemption. Instead, the debtor would be able to retain only $7,500.00 of the value in real estate that the debtor uses as his residence. 11 U.S.C. §522(d)(1) (1988). The fact that the debtor could elect to proceed under the generic scheme set

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subsection (d) of Bankruptcy Code §522 places a limitation on the exemption which is not otherwise found in ERISA. It limits the exemption to benefits that are reasonably necessary for the support of the debtor and dependents of the debtor. This limitation may be chosen by a debtor in a non-opt-out state because of the enhancements offered under other of the alternative exemptions.

This alternative exemption scheme should not affect the interpretation of the otherwise existing exemptions which have a source independent of the exemptions set forth in subsection (d) of Bankruptcy Code §522. *In re Komet*, 104 B.R. at 812-13. Accordingly, treating ERISA as the federal law exemption it clearly is can be easily reconciled with the limitation placed on retirement benefits for a debtor who chooses to proceed under the alternative exemption scheme of Bankruptcy Code §522(d).

2. The Legislative History is Inconclusive.

The second reason advanced by Patterson why ERISA does not create an exemption under federal law is that the House and Senate Reports that list examples of federal exemptions in the legislative history of Bankruptcy Code §522(b) omitted any reference to ERISA. Patterson cites the strong *dicta* in *Goff* in support of this

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forth in Bankruptcy Code §522(d) and not avail himself of the exemption relating to property as tenants by the entirety should not affect the manner in which the bankruptcy courts construe the exemption for tenants by the entirety property.

argument. *Goff v. Taylor (In re Goff)*, 706 F.2d 574, 585 (1983). There are three responses to this argument.

First, courts should not refer to the legislative history of a statute for interpretation of it unless the statute itself is ambiguous and needs interpretation. *Burlington Northern R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 451 (1987) (an unambiguous statute must be regarded as conclusive absent any clearly expressed legislative interpretation to the contrary). There is no ambiguity contained in the plain meaning of Bankruptcy Code §522(b)(2)(A). The suggested ambiguity is contrived by Patterson's first argument. Furthermore, there is nothing in the Bankruptcy Code itself that purports to limit a debtor's access to federal exemptions that are created outside of bankruptcy.

Second, the legislative history list was never intended to be exclusive. H.R. Rep. No. 595, 95th Cong. 1st Sess., n. 157 at 360, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6316 ("if the debtor chooses Bankruptcy Code [§522(b)], *some* of the items that *may* be exempted under federal laws *include* . . . . ") (emphasis supplied). No inference should be drawn from an omission made to an illustrative list.[21] *Pension Benefit Guaranty Corp. v. LTV Corp.*, 110 S.Ct. 2668, 2677 (1990) (statutory

[21] It has been suggested that the reason the legislative list omitted ERISA was not an oversight on Congress' part at all. Rather, since ERISA pension plans are excluded from a bankruptcy estate by the trust exclusion in Bankruptcy Code §541(c), Congress may have felt it was unnecessary to list an exemption for them in the legislative history of Bankruptcy Code §522. Flint, *ERISA: Anti-Alienation Superiority in Bankruptcy*, 94 W.Va. Law Rev. 411, 453, n.182 (1991-92).

language not modified by examples set forth in legislative history).

Finally, the legislative history list contains mistakes. For example, the list refers to Civil Service Retirement and to Foreign Service Retirement and Disability Payments both of which had been changed prior to adoption of the Bankruptcy Code. *See In re Burns*, 108 B.R. 308, 315, n.7 (Bankr. W.D. Ok. 1989). Accordingly, the legislative history should not be read as anything more than an "illustrative list" which merely indicates what might qualify for exemption under Bankruptcy Code §522(b)(2)(A).

C. The Strained Interpretation Advanced by *Goff* and Its Progeny Frustrate the Policies That the Bankruptcy Code and ERISA Were Intended to Advance.

The same courts that hold that ERISA must comply with state spendthrift trust law for qualified retirement benefits to be excluded from a bankruptcy estate, also conclude that ERISA preempts any state law provision that would provide an exemption for these same retirement plan benefits. *See, e.g., Reed v. Drummond (In re Reed)*, 951 F.2d 1046 (9th Cir. 1991). These cases, after concluding there is no federal exemption under ERISA available to exempt plan benefits, hold that because a state's exemption law dealing with retirement benefits "relates to ERISA," the exemption is preempted by ERISA. *Id.* at 1048, *citing Ingersoll-Rand Co. v. McClendon*, 498 U.S. ___, 111 S.Ct. 478, 484 (1990). This holding makes Bankruptcy Code §522(d)(10)(E) the exclusive means by

which a debtor can exempt qualified retirement plan benefits.

The Hobson's choice that results from these rulings means that plan beneficiaries in states that have "opted-out" of the alternative exemption scheme have no way to protect any portion of their retirement benefit. This result represents a significant departure from the law as it existed prior to adoption of the new Bankruptcy Code and it also serves to frustrate the pension protections of ERISA and the fresh start policy of the Bankruptcy Code.

CONCLUSION

The ruling of the Court of Appeals for the Fourth Circuit in this case should be affirmed. This Court should find that the term applicable nonbankruptcy law, as used in 11 U.S.C. §541(c)(2) (1988), refers to federal laws such as ERISA as well as state law and that a debtor's interest in an ERISA qualified pension plan does not become a part of a debtor's bankruptcy estate. In the alternative, if this Court determines that an ERISA qualified pension plan is property of the bankruptcy estate, then this Court should find that the term other federal law, as used in 11 U.S.C. §522(b)(2)(A) (1988 & Supp. II 1990), includes

ERISA and that a debtor's interest in an ERISA qualified pension is exempt from the debtor's bankruptcy estate.

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